

BEFORE THE
Federal Communications Commission

In the matter of

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Amendment of Section 73.202(b)
FM Table of Allotments,
FM Broadcast Stations.
(Sells, Arizona)

)
)
) MB Docket No. 02-276
) RM-10617
)

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To: Office of Secretary
Attn: Chief, Audio Division
Media Bureau

MAR 23 2005

Federal Communications Commission
Office of Secretary

Opposition to Petition for Reconsideration

Journal Broadcast Corporation ("Journal") , by its counsel, pursuant to Section 1.429(f) of the Commission's rules, hereby submits this Opposition to the Petition for Reconsideration ("Petition") filed by Lakeshore Media, LLC ("Lakeshore") on January 10, 2005, with regard to Report and Order DA 04-3514 (rel. November 22, 2004) ("Report and Order"). Journal urges the Audio Division to affirm the result reached in the Report and Order and to deny Lakeshore's Petition. In support, Journal states the following:

1. In the Report and Order, the Audio Division granted a petition for rule making submitted by Rural Pima Broadcasting ("Rural Pima") which proposed the allotment of Channel 285A to Sells, Arizona, and denied the counterproposal of Lakeshore, licensee of station KWCX-FM (Channel 285C2), Willcox, Arizona, which proposed the substitution of Channel 285C3 for Channel 285C2 at Willcox, the reallocation of Channel 285C3 from Willcox to Davis-

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Monthan Air Force Base, Arizona, and the modification of Station KWCX-FM's license accordingly.

I. The Audio Division Correctly Concluded that the New Allotments Proposed by Lakeshore Can Not Be Used as "Backfill" for the White Area Which Would Be Created by Lakeshore's Counterproposal.

2. The Audio Division's conclusion that Rural Pima's proposal was superior to Lakeshore's counterproposal was based on the fact that Lakeshore's counterproposal would eliminate the only fulltime aural service currently received by 2,846 persons residing within 2,142 square kilometers, and would eliminate the second fulltime aural service currently received by 1,022 persons in an area of 1,068 square kilometers. Report and Order, Paragraph 8. Lakeshore does not challenge this determination. Rather, it continues to insist that no white area would be created "*as a matter of law*" (Petition, Paragraph 5, italics in the original) because its counterproposal contemplates the addition of two new FM allotments to Willcox (i.e., Channels 283C2 and 245C2), which would (it asserts) provide service to the area/population which would be losing its only service. The Audio Division squarely rejected this argument, citing the Commission's decision in Pacific Broadcasting of Missouri, LLC, 18 FCC Rcd 2291 (2003), recon. den., 19 FCC Rcd 10,950 (2004) ("Refugio"). Report and Order, Paragraph 8.

3. In Refugio, the Commission directed the staff to discontinue the prior practice of considering new FM allotments as providing "backfill" in cases where a rulemaking proposal would eliminate the only other fulltime aural service in a community. It stated that henceforth, rule making petitioners seeking a change in community of license "may do so only if there is another operating station licensed to the community being vacated, or if the proposed backfill involves a currently licensed and operating station that can be reallocated to the community being

vacated, and the backfill reallocation itself complies with local service floor requirements.” Id., at page 2296.

4. In its decision on reconsideration of Refugio, the Commission affirmed its initial conclusion, and again emphasized that when considering the loss of the sole existing aural facility, it would not consider mere allotments as satisfactory replacements. Referring to its decision in Community of License Memorandum Opinion and Order, 5 FCC Rcd 7094 (1990), granting reconsideration in part and denying reconsideration in part, 4 FCC Rcd 4870 (1989) (“Community of License”), the Commission explained that it had “explicitly rejected an approach that would routinely permit the use of vacant allotments to ‘preserve’ local service. It held at the time that a vacant allotment ‘does not adequately cure the disruption to existing service occasioned by removal of an operating station. From the public’s perspective, the potential for service at some unspecified future date is a poor substitute for the signal of an operating station...’ ” (footnote omitted). Accordingly, the Commission concluded that “the better policy is to accept rulemaking proposals requesting a change in the community of license of the sole local service licensed to a community only upon the initiation of broadcast operations by a replacement service” (footnote omitted). Refugio, at page 10,956.

5. There is one difference between the situation in Refugio and the current situation; namely, in Refugio the proposed allotments were “backfill” to replace a community’s only local transmission service, while in this case the allotments proposed by Lakeshore are “backfill” to avoid the creation of “white” (and “gray”) areas in which there would otherwise be no fulltime aural reception service. However, as the Audio Division concluded, the rationale of Refugio applies with full force to the current situation. Report and Order, Paragraphs 7-9. Indeed, based on the priority structure established in Revision of FM Assignment Policies and Procedures, 90

F.C.C. 2d 88 (1982)¹ (“Revision”), it follows that the reasoning of Refugio applies with even greater force to the current situation. Here, Lakeshore’s proposal would result in the loss of existing reception service—Priority 1, while in Refugio the proposal involved only the loss of existing transmission service—Priority 3. Since the Commission refuses to consider new allotments to remedy service losses of Priority 3, it follows that the same result must apply with regard to the service losses of higher priority status (*i.e.*, Priority 1) which are at issue in this case.

6. Lakeshore insists that the Audio Division’s approach to “white” area in the Report and Order is at odds with the Commission’s decision in Greenup, Kentucky and Athens, Ohio, 6 FCC Rcd 1493 (1991) (“Greenup”). Petition, Paragraph 4. This is not correct. As explained in the Report and Order (Paragraph 9), the issue at bar in Greenup was whether the existence of unused allocations should be considered in evaluating a claim that a pending proposal was entitled to credit (*vis-à-vis* other proposals) for providing a first or second reception service (Priority 1 and Priority 2, respectively, under Revision). That issue is distinct from the issue presented here – *i.e.*, whether mere proposed (unused) allotments should be considered in determining whether the loss of the only existing reception service creates “white” area. The Commission’s determination that unused allotments should be considered in the context of a petitioner’s proposal to add new service (*i.e.*, Greenup) is perfectly consistent with its decision not to consider unused allotments in the context of a proposal which would result in the loss of a current allotment (*i.e.*, Refugio) or current service to what would be unserved or severely underserved areas (*i.e.*, the present case).²

¹ The allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *Id.*

² Lakeshore also asserts that its proposal to add allotments to Willcox, Arizona, to avoid the creation of “white” areas is “consistent with past procedure,” and cites Eatonton and Sandy Springs, Georgia, and Anniston and

II. Lakeshore's Reliance on Two Pending Applications Is Misplaced

7. In Paragraphs 16-17 of its Petition, Lakeshore explains that the engineering report submitted with its initial counterproposal is no longer accurate, and reports two intervening matters which, it asserts, are relevant to the case. Specifically, it notes that (1) the licensee of Station KCDQ(FM), Tombstone, Arizona, has filed an application to modify the station's facilities (BPH-20010525AAX, amended January 28, 2004, pursuant to MB Docket No. 02-374), and (2) Cochise Broadcasting LLC was the high bidder in FM Auction #37 for a new FM station on Channel 279C at Lordsburg, New Mexico (BNPH-20041201CAN). According to Lakeshore, the stations proposed in these applications would provide service to all, or virtually all, of the white area which would be created by the removal of Channel 285C2 at Willcox, Arizona.

8. Lakeshore's claim regarding the service that might be provided by the pending Tombstone and Lordsburg applications should be disregarded for purposes of this proceeding. The fact is that the Tombstone and Lordsburg applications are just that—they are applications, and nothing more. Lakeshore's position essentially assumes that the pending Tombstone and Lordsburg applications are currently grantable and will in fact soon be granted by the Commission (as currently proposed). It further assumes that the new facilities will promptly be constructed and programming will commence in due course. Of course, all this is pure speculation by Lakeshore.

. . . Cont'd.

Lineville, Alabama, 6 FCC Rcd 6580, 6584 n. 30 (1991) ("Eatonton"), and Caliente, Nevada, et al., DA 04-2146 (rel. Sept 3, 2004) ("Caliente"), in support of its position. Petition, Paragraph 1. These cases offer no support for Lakeshore's position. To the extent that footnote 30 of Eatonton suggests that the Commission considers new allotments as replacements for the loss of existing service in areas with only one or two reception services, this comment is pure dicta (as the proposal in question was rejected), and in any event has clearly been superseded by the Commission's express subsequent holding to the contrary in Refugio. Lakeshore is correct in noting that in Caliente a rulemaking petitioner did propose new allotments in order to prevent the creation of certain "white" and "gray" area. However, Lakeshore's reliance on this case is clearly misplaced because the Audio Division explained that it was "unnecessary" to consider the matter because, according to the Commission's computations, the areas in question were completely unpopulated. Id., Paragraph 13.

9. In fact, there is good reason to believe that neither of the applications will be granted anytime soon, as both applications are defective and/or require waivers of Commission rules. See the attached Engineering Statement of Roy P. Stype, III, which explains that (1) the Lordsburg application does not contain a showing of coverage over the community of license with the signal strength required by Section 73.315(a) of the rules, and requires a waiver of Section 73.316(b)(1) (regarding maximum directionalization); (2) both the Lordsburg and the Tombstone applications are short-spaced to Mexican stations or allotments; and (3) both the Lordsburg and the Tombstone applications require co-ordination and approval by Mexican authorities. For these reasons, grants of either or both of the applications are anything but certain, as is the timeframe for Commission action on the applications. The problems in the applications relied upon by Lakeshore in Paragraphs 16-17 of its Petition demonstrate the wisdom of Refugio; namely, that when considering a proposal to eliminate existing service to substantial areas/populations which would become “white” or “grey” areas, “only the initiation of broadcast operations by the replacement station” would be considered. Refugio, at page 10,956 (emphasis added). Accordingly, the pending Tombstone and Lordsburg applications are completely irrelevant for present purposes.

III. Davis-Monthan Air Force Base is Not a Community for FM Allotment Purposes.

10. Because the Audio Division rejected Lakeshore’s proposal on the ground that it would create substantial new “white” and “grey” areas, there was no need to consider Journal’s argument that the Davis-Monthan Air Force Base should not be considered as a legitimate “community” for FM allotment purposes.³ In the event the Audio Division reaches conclusions contrary to the positions taken by Journal in Sections I and II, above, Journal asks that this

³ See, Report and Order, footnote 12.

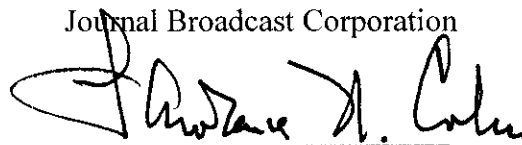
argument be considered on the merits. As explained in Journal's Reply Comments filed April 18, 2003, Davis-Monthan Air Force Base is not recognized by the U.S. Census in any manner (either as a community or as a census designated place), and is located entirely within the city limits of Tucson, Arizona. For this reason, Journal believes that it should not be recognized as a "community" for FM allotment purposes.

Conclusion

For the foregoing reasons, Journal submits that the reasoning and result reached in the Report and Order was correct on the basis of the facts then before the Commission, and that the new matters brought to the Commission's attention in Lakeshore's Petition do not change the decision. For these reasons, as well as those explained in Section III, above, Journal submits that the Audio Division should deny Lakeshore's Petition for Reconsideration.

Respectfully submitted

Journal Broadcast Corporation

A handwritten signature in black ink, appearing to read "Joseph M. Di Scipio", is written over a horizontal line.

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Date: March 23, 2005

ENGINEERING STATEMENT IN
SUPPORT OF OPPOSITION TO
PETITION FOR RECONSIDERATION

MM DOCKET 02-376

Journal Broadcast Corporation
Tucson, AZ

March 23, 2005

CARL E. SMITH CONSULTING ENGINEERS

ENGINEERING AFFIDAVIT

State of Ohio)
) ss:
County of Summit)

Roy P. Stype, III, being duly sworn, deposes and states that he is a graduate Electrical Engineer, a qualified and experienced Communications Consulting Engineer whose works are a matter of record with the Federal Communications Commission and that he is a member of the Firm of "Carl E. Smith Consulting Engineers" located at 2324 North Cleveland-Massillon Road in the Township of Bath, County of Summit, State of Ohio, and that the Firm has been retained by the Journal Broadcast Corporation to prepare the attached "Engineering Statement In Support of Opposition To Petition For Reconsideration - MM Docket 02-376."

The deponent states that the Exhibit was prepared by him or under his direction and is true of his own knowledge, except as to statements made on information and belief and as to such statements, he believes them to be true.

Roy P. Stype, III

Subscribed and sworn to before me on **March 23, 2005.**

Nancy A. Adams
Notary Public

/SEAL/

MELROY A. ADAMS, Notary Public
Residence - Cuyahoga County
State Wide Jurisdiction, Ohio
My Commission Expires Sept. 5, 2005

ENGINEERING STATEMENT

This engineering statement is prepared on behalf of the Journal Broadcast Corporation, licensee of several radio stations in the Tucson, Arizona area. It supports the instant Opposition to the *Petition for Reconsideration* ("the KWCX-FM petition") filed in MB Docket 02-376 by the licensee of Radio Station KWCX-FM, Willcox, Arizona. KWCX-FM presently operates on Channel 285C2. It filed a counterproposal in this rulemaking proceeding proposing to substitute Channel 285C3 at Davis-Monthan Air Force Base, Arizona for Channel 285C2 in Willcox, Arizona and modify the license for KWCX-FM to specify operation on Channel 285C3 at Davis-Monthan Air Force Base. The *Report and Order* in this proceeding denied this counterproposal because the proposed reallocation would create new "white area" and the two new "backfill" allocations proposed in the KWCX-FM counterproposal were deemed not to be an acceptable replacement for the existing service from KWCX-FM, which provides the only full time aural service to the new "white area" which would have been created by the proposed reallocation.

The KWCX-FM petition, among other things, claims that, as the result of "changed circumstances", the proposed KWCX-FM reallocation will no longer result in the creation of new "white area". Specifically, the "changed circumstances" noted in the KWCX-FM petition are:

- 1) The November 3, 2004 amendment filed by Cochise Broadcasting, LLC, the licensee of KCDQ(FM) - Douglas, Arizona to their pending application (BPH-20010525AAX) to modify their operating facilities to change their community of license to Tombstone, Arizona, as authorized in MB Docket 02-374.

- 2) The filing of a "long form" construction permit application (BNPH-20041201CAN) by Cochise Broadcasting, LLC, the winning bidder in Auction 37 for Channel 279C3 in Lordsburg, New Mexico.

Neither of these "changed circumstances", however, involves the actual authorization of new service or the actual commencement of new or modified operation which would provide a new service to this "white area". Instead, they both involve only pending applications for new or modified facilities and provide no guarantee that the facilities proposed in either of these pending applications will be authorized in the near future or any guarantee that the facilities proposed in either of these applications will ever be implemented if they are ultimately authorized. In fact, as outlined below, a review of these two applications found potentially major issues which could prevent either of these applications from being granted in their present form.

Lordsburg Application (BNPH-20041201CAN)

The Lordsburg "long form" application proposes a "one step" upgrade to Channel 279C from a site located 83.8 kilometers (52.1 miles) west of Lordsburg. Although this "long form" application certifies in Section III that the proposed facilities will comply with the principal community coverage requirements outlined in Section 73.315(a) of the FCC Rules, this is not the case. In fact, when projected using the FCC's standard prediction methodology, the 70 dBu principal community contour for these proposed facilities falls 19 kilometers short of Lordsburg, failing to encompass any portion of the community. While this application vaguely alludes to a "Supplemental Prediction of Coverage", it includes no such supplemental showing or any other data to support a claim that the proposed facilities will provide the required principal community coverage

to Lordsburg. Nor does it include a request for a waiver of these principal community coverage requirements.

In order to attempt to provide the required protection to several short spaced Mexican facilities, this "long form" application proposes the use of a directional antenna which has a maximum to minimum radiation ratio of 18.1 dB. This exceeds the 15 dB maximum suppression permitted by Section 73.316(b)(1) of the FCC Rules. The applicant has not acknowledged this rule violation or requested any sort of a waiver of this rule section to permit this excessive pattern suppression. The U.S./Mexican FM agreement also imposes a 15 dB limit on the suppression of a directional antenna, except when greater suppression is required to minimize multipath problems due to signal reflections from adjacent terrain. While the applicant briefly addresses this issue, no detailed documentation is provided to document that such excessive pattern suppression is actually required to prevent such multipath problems, rather than simply to permit maximization of the proposed operating facilities in other directions.

The Lordsburg "long form" application proposes operation from a transmitter site which fails to comply with the spacing requirements outlined in the U.S./Mexican FM agreement to XHRZ-FM - Nogales, Sonora, which is authorized to operate on Channel 278B, and to vacant Mexican allotments on Channel 280B in Cananeo, Sonora and on Channel 278C in Nacozet de Garcia, Sonora. While, as noted above, the applicant has proposed the use of a directional antenna to attempt to provide the required protection to these short spaced Mexican facilities, it does not appear that Mexican concurrence has yet been received for the proposed Lordsburg facilities, as is required by this agreement before this application can be granted. Nor is there any guarantee

that Mexico will actually grant their concurrence for the facilities presently proposed in this application. Even if such concurrence is ultimately granted by Mexico, however, obtaining such concurrence has historically been a long, time consuming process, especially in cases such as this which involve a proposed specially negotiated short spaced assignment which must utilize a directional antenna to provide the required protection to the short spaced Mexican facilities. Thus, based on this information, there is no certainty that Mexican concurrence will be granted for the proposed Lordsburg facilities and there is also no certainty when such concurrence might be received if it is ultimately provided by the Mexican government.

KCDQ Application (BPH-20010525AAX)

The KCDQ application, as amended, proposes operation on Channel 237C0 from a transmitter site which fails to comply with the spacing requirements outlined in the U.S./Mexican FM agreement to a vacant Mexican allotment on Channel 237C in Caborca, Sonora. While the applicant has proposed the use of a directional antenna to attempt to provide the required protection to this Mexican allotment, it does not appear that Mexican concurrence has yet been received for the proposed KCDQ facilities, as is required by this agreement before this application can be granted. Nor is there any guarantee that Mexico will actually grant their concurrence for the facilities presently proposed in this application. Even if such concurrence is ultimately granted by Mexico, however, obtaining such concurrence has historically been a long, time consuming process, especially in cases such as this which involve a proposed specially negotiated short spaced assignment which must utilize a directional antenna to provide the required protection to the short spaced Mexican facility. Thus, based on this information,

there is no certainty that Mexican concurrence will be granted for the proposed KCDQ facilities and there is also no certainty when such concurrence might be received if it is ultimately provided by the Mexican government.

Certificate of Service

I, Brenda Chapman, hereby certify that on this 23rd day of March, 2005, a copy of the foregoing "Opposition to Petition for Reconsideration" was delivered via first class, U.S. mail, postage prepaid or via hand delivery where indicated to the following:

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